

CHARLES H. MONTANGE

ATTORNEY AT LAW

426 NW 162ND STREET

SEATTLE, WASHINGTON 98177

(206) 546-1936

FAX: (206) 546-3739

24 July 2017

Surface Transportation Board
Att: Joshua Wayland, Office of Environmental Analysis
395 E Street, S.W.
Washington, D.C. 20472

Re: Comments on Cultural Resources
Identification Report in AB 167-1189X,
Conrail - Ab. Ex. - in Hudson County, NJ
(Harsimus Branch)

Dear Mr. Wayland:

This letter is on behalf of City of Jersey City ("City"), Rails to Trails Conservancy ("RTC"), and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("Coalition"), collectively "City et al." City et al hereby respond to an undated letter (hereinafter "Donato letter") recorded as received on July 5 at the STB "environmental correspondence" website for AB 167-1189X, authored by counsel (Ms. Donato) for the LLCs' (212 Marin Boulevard, LLC, et al, otherwise referred to as the "developer" or "Hyman interests"). The Donato letter purported to convey to STB a set of documents, mainly pre-dating the year 2000 and associated with Conrail's witness Ryan in F.D. 34818, which counsel for the LLCs states "are highly relevant," and which she claims were not provided by City. Since Ms. Donato filed the documents as "correspondence," they are evidently intended for consideration only on environmental matters of concern to the Office of Environmental Analysis ("OEA"). Contrary to Ms. Donato's claims, City et al understand OEA long ago to have considered the documents. This is made clear in OEA's reference to the Ryan Verified Statement (which provides Conrail's interpretation of the documents) in OEA's initial Environmental Assessment issued in this proceeding on March 23, 2009. The documents no longer have any relevancy,

nor did they in the first instance.¹ In any event, Ryan and the documents on which he relies miscast events,² but do not merit

¹ At the time of the documents (that is, pre-2000), the Jersey City Redevelopment Agency (JCRA) was working with Consolidated Rail Corporation (Conrail) to facilitate private redevelopment of portions of the Harsimus Branch. Mr. James nominated the Harsimus Embankment for the National Register with the understanding that, in order to redevelop the Harsimus Branch as then contemplated, Conrail would have to obtain an STB abandonment license, and that section 106 would have to be complied with before the property could be sold. James Verified Statement filed on 19 June 2017 with OEA (EL 26119) in AB 167-1189X, at p. 1. For this and related reasons, JCRA necessarily ceased working with Conrail for private development of the Branch. See, e.g., Verified Statement of Eleuterio Maldonado, Jr., Attachment II to City et al Rebuttal Statement in F.D. 34818, May 9, 2016 (esp. para. 4 to 6). But the City timely expressed interest in acquiring the property in a lawful fashion for public purposes. See, e.g., id. In order for anyone (including City) lawfully to acquire what was obviously a line of railroad (the former PRR mainline for freight), the property must first be authorized for abandonment and federal remedies (like section 106 of the National Historic Preservation Act, 54 U.S.C. 306108) must be applied. Contrary to the table affixed to the Donato letter, since at least early 2003, the City has pursued acquisition of the corridor for transportation (rail and trail) and open space/park uses (e.g., City et al Opening Statement, Appendix VII (Corrado Verified Statement 3/6/2006) filed 10 March 2006 in F.D. 34818.

There would be no section 106 process and Conrail and the developer would have proceeded to destroy assets protected by section 106 had City et al not filed F.D. 34818 and subsequent litigation to force Conrail and the developer to comply with the law.

² Ryan portrays the City as uninterested in the Branch. A more accurate statement of the City's continuous interest in the corridor is found in Verified Statement of Eleuterio Maldonado, Jr., Attachment II to City et al Rebuttal Statement in F.D. 34818, May 9, 2016. This is supported by other verified statements and documents which City supplied in F.D. 34818. However, the inaccuracy of Ryan's claims (and by extension the

further discussion as they are not germane to the Cultural Resources Identification Report, adverse effects, or mitigation.

The Harsimus Embankment was determined eligible for the State Register on Dec. 29, 1999, and for the National Register on March 16, 2000. But the New Jersey State Historic Preservation Office has now determined the entire Harsimus Branch, Marin Boulevard through CP Waldo, eligible for the State and National Registers. SHPO Opinion Letter 7/14/2017, p. 6 of 11, STB OEA EL 26148. This further confirms that the documents tendered by the Donato Letter have no relevancy at all to any pending issue in this proceeding.

City stands ready to enter into a binding memorandum of understanding to acquire the Harsimus Branch from Marin to CP Waldo for public uses and restoration consistent with all reasonable historic preservation concerns. In contrast, Conrail did not lawfully and timely seek an abandonment authorization, much less comply with section 106, before purporting to sell some eight blocks of a section 106-protected asset to a developer for destruction. Unfortunately, the developer and Conrail continue to pursue their destructive aims. The position taken by the developer, as manifest in the Donato Letter, underscores the developer's goal, to which Conrail is contractually committed, to maximize the adverse impact on all section 106 assets involved. This also further emphasizes how the unlawful sale of the property to the developer in 2005 is relied upon by the developer and Conrail to foreclose any reasonable opportunity for meaningful comment under section 106.³


LLCs' claims as presented by the Donato Letter) does not appear relevant to any matter before OEA.

³ From time to time, Conrail and the LLCs suggest that the City should have acquired the Branch illegally and without any compliance with abandonment authorization requirements or section 106, in the same fashion as the developer. But the United States Court of Appeals for the D.C. Circuit has made it crystal clear that the City is not required to engage in unlawful self-help; that is, illegally to purchase the property (either by voluntary sale or by eminent domain) before STB issues an effective abandonment authorization. Moreover, the D.C. Circuit has made it crystal clear that City et al are entitled to seek and to rely upon all available federal (and perforce federally-mediated state law remedies available upon abandonment) to acquire the property, including remedies which

Failure to comment further on the Donato Letter or the material submitted with it should not be construed as agreement to any assertion made by Ms. Donato or the LLCs in any filing, or to any inference against the City et al's interests that Ms. Donato, the LLCs, or Conrail purport to make on the basis of any document filed by Ms. Donato or the LLCs in this proceeding.

There is one document filed in F.D. 34818 which is germane to this proceeding, and which Ms. Donato failed to present, but which is increasingly germane due to her new role as counsel for the LLCs in AB 167-1189X. In particular, in a document filed in F.D. 34818, Ms. Donato acknowledges that if the LLCs lose their contention that the property was not a line of railroad, then the LLCs "do not have title to the property..."⁴ The LLCs, of course, lost their claim that the Harsimus Branch was not a line of railroad. Instead, the Harsimus Branch has conclusively been determined to be a line of railroad subject to STB abandonment jurisdiction. City of Jersey City v. Consolidated Rail Corporation, 968 F. Supp. 2d 302 (D.D.C. 2013), aff'd City of Jersey City v. Consolidated Rail Corporation, D.C.Cir. No. 13-7175, Feb. 19, 2014. It follows from Ms. Donato's admission that the LLCs do not have or should lose title to the property. This is germane to many historic preservation issues, including mitigation, as well as remedies for the unlawful sale.

Respectfully submitted,


Charles H. Montange

for City of Jersey City, et al.

Att. (Transcript with Ms. Donato's admission)

cc. City, RTC, Coalition (w/att.)

should reduce costs and otherwise facilitate acquisition. See City of Jersey City et al v. Consolidated Rail Corporation, 668 F.3d 741 (D.C. Cir. 2012).

⁴ See City et al's Reply to the LLCs Petition for Reconsideration in F.D. 34818, filed on September 18, 2007 with STB, excerpts of transcript of oral argument in 389 Monmouth Street, LLC, et al v. Historic Preservation Commission of the City of Jersey City, et al, Hudson County Superior Court docket HUD-L-000804-06 (one of the LLCs' many state suits against the City arising out of their illegal acquisition), transcript at 19 (Ms. Donato, speaking for the LLCs).

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CIVIL PART
HUDSON COUNTY
APP. DIV.

389 MONMOUTH STREET, LLC, et al., : DOCKET NO.
: HUD-L-000804-06

Plaintiffs,

vs.

HISTORIC PRESERVATION COMMISSION
OF THE CITY OF JERSEY CITY, et al.,

Defendants.

THE CITY OF JERSEY CITY,

Plaintiffs,

vs.

415 BRUNSWICK STREET, LLC, et al.,

Defendants.

: DOCKET NO.
: HUD-L-1554-06

: TRANSCRIPT

: OF

: MOTIONS

212 MARIN BOULEVARD, LLC,

Plaintiffs,

vs.

THE CITY OF JERSEY CITY, et al.,

Defendants.

: DOCKET NO.
: HUD-L-000800-06

Place: Hudson County Courthouse
595 Newark Avenue
Jersey City, N.J. 07306
Date: July 21, 2006

////////////////////////////////////
METRO TRANSCRIPTS, L.L.C.

Patrice Mezzacapo

316 Ann Street

Randolph, New Jersey 07869

(973) 659-9494
////////////////////////////////////

I N D E X07/21/06

	<u>Page</u>
<u>ARGUMENT</u>	
By Ms. Donato	5
By Mr. Curley	9
<u>COURT DECISION</u>	21

Colloquy

4

THE COURT: All right. Seeing how we're seated, this tells me that it's City of Jersey City v. 415 Brunswick Street, LLC.

MR. CURLEY: Yes, Your Honor.

THE COURT: The Docket No. is HUD-L-1554-06. You are now the plaintiff, Mr. Curly.

You want to give your appearance and spell your last name for the purpose of the tape?

MR. CURLEY: John J. Curly, C-U-R-L-E-Y, for the plaintiff City of Jersey City.

THE COURT: Ms. --

MS. DONATO: Michele R. Donato, D-O-N-A-T-O, on behalf of 415 Brunswick Street, LLC.

MR. HAMILL: Jay Hamill, H-a-m-i-l-l, Bogart, Keane, Ryan, Hamill, on behalf of Jersey City Planning Board.

THE COURT: All right. This is your motion, Ms. Donato -- you can be seated -- to dismiss the complaint of Jersey City for failure to state a claim from which relief can be granted.

And there's also a motion to consolidate made by Mr. Curley, correct?

MR. CURLEY: Yes, Your Honor.

THE COURT: All right. We'll hear you, Ms. Donato.

1 MR. HAMILL: That's fine. I just wanted -- I
2 just wanted to make sure that that wasn't including the
3 other matter. I'm sorry.

4 THE COURT: Okay. What's the choice?

5 MS. DONATO: Your Honor, may I just make a
6 point of clarification?

7 THE COURT: Sure.

8 MS. DONATO: I did indicate that if the STB
9 rules against us that, you know, we obviously don't
10 have an approval. Of course, it would be subject to
11 any appeals that they might take. If there's an
12 appeal, you know, and there's -- whatever the
13 successful -- whenever the litigation with the STB is
14 over, if we, you know, exhaust all of our litigation
15 remedies and we continue to lose, then of course, we do
16 not have title to the property, and we lose any value
17 of the improvements that we may have -- and the
18 approvals that we may have obtained.

19 And the other thing is, Your Honor, with
20 regard to Mr. Curley's argument about the unitary
21 nature of the structure, there's not anything in the
22 ordinance that addresses this point. It's being
23 created out of whole cloth. This is --

24 THE COURT: Regardless -- regardless, it was
25 already -- it was -- presumably, it could have been or

1 was considered. Okay?

2 MS. DONATO: Thank you, Your Honor.

3 THE COURT: Now we're back to you, Mr.
4 Curley. Are we taking a voluntary dismissal of this
5 case without prejudice and without cost? Given --

6 MR. CURLEY: I don't think I can --

7 THE COURT: Given what is on the record.

8 MR. CURLEY: I don't think I can make that
9 decision on my own, Your Honor.

10 THE COURT: Oh, yes, you can.

11 MR. CURLEY: I don't believe I can.

12 THE COURT: Well, do we want to make a
13 telephone call?

14 MR. CURLEY: I will make a telephone call.

15 THE COURT: Make a telephone call right now.
16 Let's get this one over with.

17 MR. CURLEY: Thank you.

18 THE COURT: Then we'll proceed step by step
19 to these vexatious litigations. Not vexatious in the
20 pejorative sense, just vexatious.

21 MR. CURLEY: Vexing.

22 THE COURT: He's vexing.

23 MS. DONATO: I thought that was very
24 (indiscernible), Your Honor, the comment. Somewhat
25 more than vexatious.